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Supreme Court, U.S.
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No. 88-1266

In The

Supreme Court of the United States

October Term, 1988

IDAHO STATE TAX COMMISSION, et al.,

Petitioners,

v.

ROBERT F. BLANGERS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Idaho

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. May a non-resident individual who earns compensation while travelling through a state on a nonstop transcontinental train be subjected to that state's income tax under the due process (U.S. Const., amend. XIV, § 1) and commerce (U.S. Const., art. 1, § 8, cl. 3) clauses?

2. Does physical presence alone, that is, without economic presence, within a state, under the conditions stated in the question presented above, constitute sufficient nexus under the due process and commerce clauses to subject non-resident individuals to state income taxes?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents oppose the Petition for Writ of Certiorari. Certiorari should be denied because (a) the decision of the Supreme Court of the State of Idaho is not in conflict with any other reported appellate decision and (b) the Supreme Court of Idaho's decision is entirely consistent with this Court's prior decisions.

OPINIONS

The opinions below are found in the Appendix to the Petition for Writ of Certiorari. The opinions consist of:

1. Kootenai County, Idaho District Court Memorandum Opinion dated January 9, 1986. Petitioners' App. at 79.

2. Supreme Court of Idaho Opinion dated May 25, 1988. Petitioners' App. at 1.[1]

3. Supreme Court of Idaho Denial of Petition for Rehearing dated October 28, 1988. Petitioners' App. at 41. (The Idaho State Tax Commission Petition for Rehearing

[1] Attached to the dissents to that opinion are docket entries in a Montana tax case. Petitioners' App. at 32-36. The Montana case was not a part of the record in the case below, is based on significantly different facts, and is therefore of no significance. If such docket entries are intended to suggest a factual relationship between the Montana case and the instant, Idaho litigation, Respondents object on the ground that they were not given an opportunity to be heard with respect to such suggestion, which they deny, and move to strike that portion of Petitioners' Appendix. The Montana case is, Respondents submit, not at issue herein.

dated June 29, 1988 is attached thereto. Petitioners' App. at 59 *et seq.*)

STATEMENT OF FACTS

The facts of the case were stipulated by the parties. (Petitioners' App. at 79-81.) As noted below, the Petition contains factual assertions not found in the record herein.

Respondents are, or were at all times material to this action, train crewmen employed by Burlington Northern Railroad Company (hereinafter "BN") or the widows of such deceased BN employees. Respondents are residents of the State of Washington.

In the course of their employment with BN, a federal land-grant railroad, as train crewmen (i.e., engineers, brakemen, firemen and conductors), Respondents occupy or occupied non-stop transcontinental freight trains travelling that part of the transcontinental route between Spokane, Washington and Whitefish or Missoula, Montana, and back to Spokane. The mileage and time spent in Idaho as a percentage of total mileage and time while employed by BN on these trains for each employee constituted less than fifty percent.

The trains on which Respondents work on the Idaho routes traverse the Idaho panhandle, through Kootenai, Bonner and Boundary counties;[2] they are "through" trains which did or do not perform station or industry switching in Idaho. The trains make no scheduled stops

[2] The Idaho panhandle is approximately 100 miles across.

in Idaho. Orders directing the trains come from without the borders of the State of Idaho. There are no crew changes within Idaho. Crews neither report for work nor are they dismissed in Idaho.

On or about June 1, 1983, Respondents received written notice from the State of Idaho that they were subject to Idaho income tax. The notice indicated that all taxes due for years prior to 1978 could be waived and no penalties imposed if returns were filed for the years 1978 through 1982 and income tax paid before a stated deadline of August 1, 1983.

Some 309 of the BN employees as a class filed a declaratory judgment action in the Kootenai County Idaho District Court. The employees sought a declaration that the Idaho State Tax Commission was prohibited by Idaho law and the federal constitution from imposing Idaho income tax on them. Judgment declaring the BN employees subject to Idaho income tax was entered by the Kootenai County District Court on February 18, 1986, and the employees appealed to the Idaho Supreme Court.

The Idaho Supreme Court reversed the trial court by Order dated October 28, 1988. Petitioners' App. at 76. The Petitioners, Idaho State Tax Commission et al., seek a Writ of Certiorari from that decision.

The "Statement of the Case" (Petition at pp. 4-6) contains statements not found in the stipulated facts of this case. On page 4, it is stated that the Respondents work in Idaho on a "regular and systematic" basis. It might be inferred, though it was not stipulated by the parties, that the transcontinental trains cross Idaho on a "regular and systematic" basis. But this inference does

not justify the additional conclusion that the BN employees involved work on those trains on a "regular and systematic" basis. In any given period, some employees may have been in substantial part employed on different rail routes, not entering or crossing Idaho.

The Petition also states (p. 6) that between 25% and 40% of the wages earned by the employees are earned while they are in Idaho. The stipulated facts do not include such a statement; such stipulated facts only say that less than 50% of the mileage and time of each employee was spent in Idaho.[3]

Petitioners also incorrectly assert that the Idaho workmens compensations laws would apply to employee injuries in Idaho. Petitioners' App., at p. 10. Respondents object to this unfounded assertion, which is not based upon the record herein, was not argued below, is not clear

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[3] The "less than 50%" criteria is that used by the Idaho Legislature in enacting § 63-3023B of the Idaho Code, effective January 1, 1988. Section 3023B was enacted by the Idaho legislature after the Washington and Utah legislatures enacted retaliatory tax legislation against Idaho residents in Washington and Utah. Effective January 1, 1988, Idaho Code § 63-3023B (*see* Idaho Supreme Court opinion upon rehearing, Petitioners' App. at p. 51) exempts rail and motor carrier employees from the Idaho state income tax if less than half of their activities are in Idaho. This statute was enacted prior to the decision of the Idaho Supreme Court in this case. Under § 3023B of the Idaho Code, the BN employees, effective January 1, 1988 are not subject to Idaho income tax under the facts of this case. As the Idaho Supreme Court correctly noted, such minimums are constitutionally irrelevant, as they are subject to change at the whim of the legislature. Petitioners' App. at 50-52.

as a matter of substantive law, and is factually incorrect. In fact, BN is self-insured for industrial insurance purposes with its employees being covered by the Federal Employers Liability Act, 45 USC 51 *et seq*. Therefore the Respondents are *not* subject to Idaho workmens compensation laws, but rather are specifically excluded therefrom. Further, Idaho Code § 72-707 is not clear with respect to its operative effect upon non-residents merely travelling across the state.

REASONS FOR DENYING THE PETITION

I. PETITIONERS' STATEMENT OF "QUESTIONS PRESENTED" DOES NOT ADDRESS TWO CRITICAL ASPECTS OF THIS CASE

The Petitioners' statement of the "Questions Presented" (Petition at p. iii) does not include two critical aspects of the case. The first is that the Respondents are in constant *travel* through Idaho while they work (i.e., they are not commuters[4]). Second, the individual employees thus as such have no contact or interaction with the economy of Idaho. The employees cannot and do not stop to load or unload freight or passengers in Idaho.

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[4] Respondents are not commuters. Commuters are persons who travel from a place of residence outside the taxing state to duty stations within such state. *See American Commuters Association, Inc. v. Levitt*, 279 F. Supp. 40, *affirmed*, 405 F.2d 1148 (2d Cir. 1969). Commuters are taxable in the state in which they work because such state provides benefits for which the state may ask return. These "benefits" include "a place to work, the commercial activity in the State[,] and general services such as

(Continued on following page)

These two points are determinative. No reported appellate decision has ever subjected non-resident individuals lacking any economic relationship to the state to state income taxes.

This Court's prior opinions further indicate that travel is a fundamental right, which may not be unduly burdened by state taxation or otherwise. *See Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 49 (1867); *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969). If the right to travel is to be accorded any dignity, it must include the right to move from one place to another, without stopping, free from the burdens associated with an *income* tax imposed upon the exercise of that right.

II. THE DECISION OF THE IDAHO SUPREME COURT IS NOT IN CONFLICT WITH ANY REPORTED APPELLATE OPINION.

Contrary to Petitioners' assertions herein, the Idaho Supreme Court's decision below is not in conflict with any reported decision. Perhaps this is due to the fact that no other state has *ever* tried to impose an income tax on a non-resident whose *sole* contact with the state consists of travelling through it on a nonstop train. *Compare Crandall v. Nevada, supra,* where the Court termed a state passenger tax an impermissible entrance and exit fee, void under fundamental principles of federalism.

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transportation, fire and police protection." *Id.*, 279 F.Supp. at 47. Respondents are provided only one of the benefits enumerated in *Levitt*, police protection. Respondents submit that any traveler or tourist is provided police protection, and that such police protection does not entitle a state to tax the traveler's or tourist's income.

Petitioners rely upon *Lung v. O'Chesky*, 617 P.2d 1317 (N.M. 1980), in which the New Mexico Supreme Court upheld state income taxation of non-residents in the state while working at a federal enclave, for the proposition that the decision of the Idaho Supreme Court is in direct conflict with the decisions of another state supreme court. Petitioners' arguments are incorrect and misleading.

There is no description in *Lung* of the nature of the taxpayers' contacts with New Mexico, although it is clear that the federal employees working in the federal enclave were subject to state taxation under the Buck Act, 4 U.S.C. § 106. For all that we can tell from the New Mexico decision, the taxpayers may have been either non-residents commuting into New Mexico to work or temporary domiciliaries of the State of New Mexico, probably the former. *See* 617 P.2d at 1318-19.

It is nowhere suggested in *Lung*, as petitioners infer, that the non-residents were taxed for travel to and from a federal enclave. *Lung* cannot be said to stand for the proposition that mere physical presence in a state constitutes a "substantial nexus" sufficient to support the imposition of state income taxes, absent interaction of any kind with the local economy.

The necessity of such economic contact to impose an income tax is recognized in *State of Alaska v. Petronia*, 418 P.2d 755 (Wash. 1966), app. dismissed, 389 U.S. 7, 88 S.Ct. 36 (1967). In *Petronia*, Washington residents worked on ships which traveled from Washington to Alaska, and while in Alaska docked at a port, apparently to load or

unload passengers or freight. Alaska sought to tax the incomes earned while in Alaska waters.

The Washington Supreme Court held that the economic relationship between the taxpayer employees and the state, which generated the taxpayers' wages, was a sufficient basis for the imposition of the tax. *See* 418 P.2d at 758 ("The business productivity generated by Alaska was accountable for the wages earned by the defendants when they were in Alaskan waters").

The *Petronia* court made it clear that the act of traversing Alaskan waters was not itself sufficient to support a state income tax. Rather, the court focused upon the economic activity in the taxing state of which the taxpayers were an integral part, and which gave rise to the taxpayers' wages. *Id.*[5]

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[5] The *Petronia* decision is clearly distinguishable from the case at bar. Assuming for the sake of argument that the ships the seamen occupied had to travel through the territorial waters of another state in order to reach Alaska. Under the Petitioners' theory of income taxation, the seaman would be taxable for merely travelling through the territorial waters of the intervening state. However, under the reasoning of the *Petronia* court, the state of taxation would only be Alaska, where the ships dock, and the seaman load and unload freight – i.e., the state where there exists not only the physical presence but also the economic presence of the seamen. Unlike the seamen in *Petronia* who docked in Alaska and were found subject to income tax in Alaska, the trainmen in the *Blangers* case do not dock in Idaho, but merely pass through Idaho to a further docking destination.

The Idaho Supreme Court below applied the reasoning of the Washington Supreme Court, and the principles announced in *Petronia*, to the question whether respondents are taxable in Idaho. Petitioners' App. at 16, 44. The reasoning employed in *Petronia* has been called the "business income generation concept." *See Sjong v. State*, 622 P.2d 967, 971 (Alaska 1981).

Using this accepted method for determining whether the due process clause of the fourteenth amendment permits Idaho to tax Respondents, the Idaho Supreme Court held that it does not, because Respondents' wages are not generated by or in Idaho. Petitioners' App. at 16, 44. The Court noted that the reasoning of the Idaho Tax Commission was dangerous, and could extend to the taxation of *any* traveler who happened to be compensated for the travel time in question. (Petitioners' App. at 49, 50.) Such a result would be entirely unprecedented, and unacceptable.

III. THE IDAHO SUPREME COURT DECISION HEREIN IS ENTIRELY CONSISTENT WITH THIS COURT'S PRECEDENTS.

In *Miller Brothers Co. v. Maryland*, 347 U.S. 340 (1954), this Court held that due process requires "some definite link, some minimum connection, between the state and the person, property, or transaction it seeks to tax." While this Court has never construed the due process clause in regard to nonresidents on through trains traversing the taxing state without stopping, several fundamental propositions have been advanced by this Court which apply to the present case.

In *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), this Court was asked to decide whether a state could tax portions of a nonresident corporation's net income, where the tax was nondiscriminatory and fairly apportioned to the taxpayer's economic activities in the state. In holding that such a tax was permissible, the Court stated, "a State cannot impose taxes upon persons passing through the state, or coming into it for a temporary purpose." *Id.* at 458, *citing Robbins v. Shelby County Taxing District*, 120 U.S. 489, 493, 494 (1887).

In *National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551 (1977), the taxpayer maintained two offices in the state, and solicited purchases by direct-mail advertising. The California Supreme Court upheld the imposition of use tax collection liability, holding that the "slightest presence" within the taxing state was sufficient to support a tax under the due process clause. *See* 16 Cal.3d 637, 644, 547 P.2d 458, 462 (1976). This Court affirmed the result, but noted that the "affirmance of the California Supreme Court is not to be understood as implying agreement with that court's 'slightest presence' standard of constitutional nexus." 430 U.S. at 556.

The Idaho Supreme Court decision implicitly recognized that imposition of the state income tax upon nonresident wage-earners who merely travel through the state on paid time would fall within the "slightest presence" standard expressly rejected in *National Geographic*. Indeed, it is difficult to imagine a "slighter" presence within the taxing state than that presented herein. If respondents' due process rights are not violated by such a tax, then there is no limit to State income taxation of nonresidents who come within a state's borders, whether

on foot, in an automobile or train, or overhead in an airplane on a business trip to some other state or country, during a tax year. But this Court, by the language of the decisions quoted above, has clearly indicated that states may not do so.

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 51 L.Ed.2d 326, 97 S.Ct. 1076 (1977), Mississippi sought to apply a tax on the privilege of doing business therein to a motor carrier which unloaded automobiles from a train in the state, and delivered the automobiles to dealers, also located in the state. This Court held that the tax was permissible, because there was a "substantial" or "sufficient" nexus between Mississippi and the taxpayer's economic activities therein which satisfied the commerce clause nexus requirement. *Id.* at 278, 287, 51 L.Ed.2d at 330, 336.

Respondents submit that mere physical presence, without economic activity related to state markets or the like, is neither "substantial" nor "sufficient" within the meaning of *Complete Auto Transit*. *See also Tyler Pipe Industries, Inc. v. Washington Dept. of Revenue*, 483 U.S. 232, ___, 97 L.Ed.2d 199, 215-16, 107 S.Ct. 2810, 2820 (1987) ("the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in [the] state").

The suggestion by Petitioners herein that Respondents regularly travel through the State of Idaho is not only inaccurate, as set forth above. It is also a constitutional irrelevancy. *See Crandall v. Nevada, supra*, 73 U.S. (6 Wall.) at 49 ("[w]e are all citizens of the United States,

and as members of the same community must have the right to pass and repass through every part of it without interruption").

This case no doubt involves fundamental questions regarding state income taxation of non-resident individuals. If Petitioners' arguments should be sustained, any interstate business traveler could be affected. The record keeping requirements alone for taxing a business traveler under Petitioners' theory would constitute a tremendous and unjustified burden on both travel and commerce.[6]

If the rail employees are subject to state income tax for passing through the state, then other business travelers are subject to state income tax for presence within a state during a tax year. For example, a salaried travelling salesman who drives from his home in New York to make a sale in Boston would be subject to state income tax in Connecticut; or a Washington, D.C. attorney taking the train to a deposition in New Jersey would be subject to state income taxes in Delaware. There is literally no end to such possibilities under Petitioners' due process theory.

In addition, some state subdivisions impose income taxes. The business traveler thus could be subject not only to state taxes but also to income taxes in any city,

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[6] The dissenting Idaho Supreme Court justices recognized the record keeping problems created by state income taxes imposed on travelers. Petitioners' App. at 56-57 (Huntley, J., dissenting from denial of petition for rehearing). The dissent suggests the use of computers for such purposes. Whether the use of a computer in such circumstances can be required of a taxpayer raises issues beyond the scope of this brief.

county or hamlet through which he might pass or over which he might fly in his business travels. Such exercises of state taxing power would seriously and unreasonably burden interstate travel and commerce.

CONCLUSION

The Idaho Supreme Court decision involves important issues governing state taxation of individuals engaged in interstate commerce. The decision, however, is not in conflict with any other appellate decision. It is squarely grounded in applicable precedents established by this Court, is equitable and should stand without necessity of review by this Court. The Petition should be denied.

Respectfully submitted,

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